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February 19, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

RE: Equal Participation of Faith-Based Organizations in Department of Justice's
Programs and Activities: Implementation of Executive Order 13831, RIN 1105-
AB58

Dear Attorney General Barr:

I write in opposition to the proposed rule to modify regulations governing partnerships between the federal government and faith-based grantees in taxpayer funded social service programs. This harmful proposal seeks to undermine important protections for vulnerable beneficiaries in programs that are funded by the U.S. Department of Justice (the Department). Accordingly, I urge the Department to immediately withdraw this proposed rule.

The release of eight departments' proposed rules to undermine the rights of beneficiaries in federally funded programs on National Religious Freedom Day underscores this Administration's fundamental misunderstanding of religious liberty as envisioned by our founders.

On National Religious Freedom Day, the United States of America celebrates the Virginia Statute for Religious Freedom (Virginia Statute) and the adoption of religious liberty as a core value to our democracy as delineated in the First Amendment to the Constitution. Over two centuries ago, the Virginia Statute, drafted by Thomas Jefferson, was adopted by the Virginia General Assembly. It would later serve as the basis for the First Amendment to the Constitution, outlining the right to free exercise of religion and the prohibition of the establishment of religion by the government. The Virginia Statute warns us against allowing religious views to supersede civil rights by stating, "our civil rights have no dependence on our religious opinions any more

than our opinions in physics or geometry.”¹ In Jefferson’s absence, James Madison would shepherd the religious freedom bill through the Virginia General Assembly to win its passage.² In the first United States Congress, then Congressman James Madison drew upon the Virginia Statute and offered an amendment to the Constitution that read in part, “[t]he Civil Rights of none shall be abridged on account of religious belief or worship.”³ Former Supreme Court Justice Wiley B. Rutledge noted Virginia’s role in the development of the First Amendment, “[t]he great instruments of the Virginia struggle...became the warp and woof of our constitutional tradition.”⁴ Thus, the history of the First Amendment is deeply rooted in the history of the Virginia Statute and the understanding that civil rights cannot and should not be diminished according to one’s religious belief and conscience.⁵ Unfortunately, with these proposed rules, the Administration contravenes the weight of this history and seeks to empower religious entities at the expense of the religious liberty rights of beneficiaries in federally funded programs.

The proposed rule removes key protections for beneficiaries in programs that are directly funded by the Department under the guise of promoting equal treatment for faith-based grantees.

The Department proposes to delete a current regulatory requirement that applies to faith-based grantees to provide written notice to beneficiaries regarding their rights to not be discriminated against on the basis of religion or their refusal to participate in religious activities. In addition, the current regulation requires that faith-based grantees provide written notice to beneficiaries informing them that any religious activity that is offered by a faith-based grantee must be separate in time *or* location from publicly funded services and that the beneficiaries have a right to an alternative service provider if they object to the religious character of the grantee. The proposed rule seeks to eliminate both the requirement to provide beneficiaries with a notice of rights as well as to eliminate the right to an alternative provider if they object to the faith-based provider. In proposing these changes, the Department argues that “[t]here is...no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.”⁶

Ensuring the religious liberty rights of beneficiaries in federally funded programs is not an undue burden. Fundamentally, Congress creates these programs to serve beneficiaries and to meet specific programmatic goals. The proposed rule undermines how beneficiaries are served in federally funded programs and thus, interferes with Congressional intent in authorized programs.

¹ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).

² *Id.*

³ *Religion and the Founding of the American Republic*, Library of Congress, <http://www.loc.gov/exhibits/religion/rel06.html> (last visited Feb. 10, 2020).

⁴ Merrill D. Peterson, *Jefferson and Religious Freedom*, *The Atlantic* (Dec. 1994), <https://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm>.

⁵ *See id.* (“The justices on the bench and the advocates at the bar were much influenced in their understanding of the ‘free exercise’ clause by their understanding of the Virginia statute and the circumstances that had produced it.”).

⁶ *Equal Participation of Faith-Based Organizations in the Department of Justice’s Programs and Activities: Implementation of Executive Order 13831*, 85 Fed. Reg. 2924 (Jan. 17, 2020) (to be codified at 28 CFR Part 38).

Additionally, it is clear that religious organizations may offer religious activities before and after the federally funded program.⁷ The elimination of these protections begs the question of how beneficiaries are supposed to know that the religious activity is “voluntary” and that they have a right to access government funded services without being subject to religious indoctrination or discriminated against on the “basis of religion or religious belief, a refusal to hold a religious belief, or refusal to attend or participate in a religious practice”?⁸ It is particularly troubling considering that some beneficiaries in programs covered by the proposed rule may be vulnerable individuals, and may become, in essence, a captive audience to religious instruction in order to access services.

The proposed rule also ignores the twenty-year history of these provisions where there were extensive debates over the inclusion of religious activity before, *during*, and after federal programs and how to ensure the rights of beneficiaries to access services notwithstanding any religious activity that may be offered. Many supporters of Charitable Choice, including previous administration officials, acknowledge that the religious experience is exactly what is being offered to beneficiaries.⁹ The former Deputy Director of the Office of Faith-Based and Community Initiatives under President George W. Bush, David Kuo, acknowledged that congressional supporters, “... wanted to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants...they wanted to allow evangelism-heavy programs to get federal money.”¹⁰ Another Bush Administration official, Robert Polito, who was the Director of the Center for Faith-based and Community Initiatives at the Department of Health and Human Services, indicated that Administration’s position on this issue, “[i]f tax dollars are used for secular elements of ...[a grant] program- like a computer or van- the rest [of the federally funded program] can have a religious base.”¹¹

As a member of Congress who participated in numerous debates over the years regarding these provisions, I heard assertions from Charitable Choice’s congressional supporters that programs are successful because of their religious nature and that religion is a methodology for treatment.¹² Thus, the beneficiary protections that currently exist—and that the proposed rule now seeks to remove—were in fact put in place as a direct response to the extensive history of those debates in Congress and the public sphere. The beneficiary protections also attempted to protect the delicate balance between the religious activity of faith-based providers and securing the religious liberty rights of beneficiaries under Charitable Choice provisions.

Moreover, the beneficiary safeguard provisions that provide beneficiaries a written notice of rights, including the right to an alternative provider, were modeled after other previous

⁷ 28 C.F. R. § 38.5 (2016).

⁸ *Id.*

⁹ See Marvin Olasky, *Rolling the Dice*, World Magazine (Aug. 4, 2001), https://world.wng.org/2001/08/rolling_the_dice.

¹⁰ David Kuo, *Tempting Faith* 160 (2006).

¹¹ Laura Meckler, *Bush Admin. Rewriting Charity Rules*, The Edwardsville Intelligencer (Sept. 2, 2002, 7:00 PM), <https://www.theintelligencer.com/news/article/Bush-Admin-Rewriting-Charity-Rules-10572847.php>.

¹² *Faith-Based Solutions: What Are the Legal Issues? Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 14 (2000) (Testimony of Representative Robert C. “Bobby” Scott).

Charitable Choice provisions, including those that exist in statute.¹³ For instance, the first Charitable Choice provision was enacted as part of the TANF statute and specifically outlines the right of beneficiaries to an alternative provider if they raise an objection.¹⁴ Similarly, the Charitable Choice provision subsequently enacted as part of the *Substance Abuse Mental Health Services Act* (SAMHSA) also provides that beneficiaries with objections to a faith-based grantee are entitled to an alternative provider and further, beneficiaries are required to be notified of their rights.¹⁵ Thus, the beneficiary protections that the proposed rule now seeks to undo have been part of Charitable Choice since its creation and are vital to protect the religious liberty of beneficiaries.

Finally, the current regulatory safeguards regarding written notice to beneficiaries of their rights, including the right to an alternative provider, were put in place by the Obama Administration after seeking recommendations from a diverse set of stakeholders. The President's Advisory Council on Faith-based and Neighborhood Partnerships (Advisory Council) issued a report with twelve recommendations—including the provisions at issue under the proposed rule—that had unanimous support. The report included the notice and alternative provider recommendation to “[a]ssure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections” noting that “[t]here is clear precedent for and consensus for the vigorous protection of the religious of beneficiaries of federally funded programs.”¹⁶ The proposed rule now seeks to remove the very protections endorsed by this diverse set of stakeholders, including both critics and supporters of Charitable Choice, on the Advisory Council.

The proposed rule eliminates core safeguards for beneficiaries and adds language that will result in beneficiaries being forced to participate in religious activities in programs funded with indirect federal financial assistance.

The Supreme Court has recognized a constitutional distinction involving the funding of religious entities between those programs funded with direct aid, where the government chooses a provider who may have a religious affiliation to provide services to beneficiaries, and programs funded with indirect aid, where funding is provided to beneficiaries who make a genuine private choice among a range of providers, including religious and secular options. The current regulations reflect the constitutional balance by ensuring a range of choices, including a secular option, for beneficiaries in indirectly funded programs. The proposed rule eliminates the current requirement for a secular option to be offered and coerces beneficiaries in need of services to

¹³ President Bush's Faith-Based Initiative legislation ((CARE Act of 2002, H.R. 7, 107th Cong.(2001)), passed by the House of Representatives with the support of two hundred and seventeen Republican Members of Congress includes both a right to an alternative provider and a right to notice of rights for beneficiaries. See *Final Votes for Roll Call 254*, Office of the Clerk U.S. House of Representatives, <http://clerk.house.gov/evs/2001/roll254.xml> (last visited Feb. 14, 2020).

¹⁴ 42 U.S.C. §604(a).

¹⁵ 42 U.S.C. §290kk-1(f).

¹⁶ President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President 140–41* (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

participate, simply by attending a program, in religious activities if those activities are part of the program.¹⁷

In *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld the constitutionality of a tuition assistance program that provided funds to eligible families to use at public and private, including religious, schools. In the majority opinion, the Chief Justice wrote, “[i]t permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.”¹⁸ To qualify as a program of “true private choice” it must (a) be “entirely neutral with respect to religion”; (b) provide “benefits directly to a wide spectrum of individuals;” and (c) permit “individuals to exercise genuine choice among options public and private, secular and religious.” The proposed rule eliminates the requirement that a secular option be made available to beneficiaries. Furthermore, the program at issue in *Zelman* prohibited discrimination, including on the basis of religion, against participants, and it also required *all* providers to follow rules and procedures set forth by the state.¹⁹ Given that the proposed rule would permit the Department to provide additional accommodations to faith-based grantees, it is not even clear that faith-based grantees will be required to follow the same rules for the delivery of services to all of its beneficiaries.²⁰

The proposed rule is a misapplication of the narrow ruling of *Trinity Lutheran* to justify changes in existing regulations governing partnerships between faith-based grantees and the Federal Government.

The Department proposes to revise the current regulations governing partnerships between faith-based entities and the Federal Government as some of the requirements placed upon faith-based organizations are “in tension with the nondiscrimination principles articulated in [*Trinity Lutheran Church of Columbia, Inc. v. Comer* 137 S. Ct. 2012 (2017)]”. (*Trinity Lutheran*).²¹ In *Trinity Lutheran*, the Court was asked to decide whether a church-run early childhood education center was eligible to participate in a Missouri state grant program that provided recycled tires to resurface playgrounds.²² The Court held that the State of Missouri violated the Free Exercise clause of the First Amendment to the Constitution by denying the church’s eligibility to participate in the state grant program solely because of the church’s religious status.²³ Although the Court found that Missouri cannot refuse to provide funding solely because of the religious nature of a daycare center, the majority opinion also clarified the narrowness of its ruling when it

¹⁷ “Section 38.5(c) is proposed to be changed in order to align the text more closely with the First Amendment and with RFRA by making clear that an organization receiving indirect financial assistance is not required to make the attendance requirements of its program optional for a beneficiary who has chosen to expend indirect aid on that program.” Equal Participation of Faith-Based Organizations in the Department of Justice’s Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2925 (Jan. 17, 2020) (to be codified at 28 CFR Part 38).

¹⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

¹⁹ *Id.* at 645, 646.

²⁰ The proposed rule creates two new appendices that make it clear that faith-based grantees might be afforded additional exemptions.

²¹ Equal Participation of Faith-Based Organizations in the Department of Justice’s Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2923 (Jan. 17, 2020) (to be codified at 29 CFR Part 2).

²² *Trinity Lutheran*, 137 S. Ct. 2012, 2017 (2017).

²³ *Id.* at 2019-20.

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stated that the case “involves express discrimination based on religious identity with respect to playground resurfacing,” and that the Court was “not address[ing] religious uses of funding or other forms of discrimination.”²⁴

In the proposed rule, the Department misapplies the limited holding in *Trinity Lutheran* because: the ruling in its own terms applied to playground resurfacing; nothing in the ruling requires or permits beneficiaries be stripped of their religious liberty rights in taxpayer funded programs, whether directly or indirectly funded; and nothing in the ruling requires or permits employees to submit to a religious test in federally funded grants. Rather, the proposed rule is a reflection of this Administration’s distorted view of religious liberty as a one-way street, where religious freedom is expanded for faith-based grantees and employers at the expense of the religious liberty rights and exercise of conscience of employees working in programs funded with federal taxpayer dollars and beneficiaries receiving services in federal grant programs.

In conclusion, the proposed rule is misguided and will lead to violations of the religious liberty rights and conscience of beneficiaries of federally funded programs. For Department funded programs, it steadfastly advances the religious freedom of religious providers while eviscerating safeguards for beneficiaries. These policies do real damage to our nation’s founding principle of religious freedom and undermine the core value of an individual’s freedom of conscience to not “otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.”²⁵

I strongly urge the Department to immediately withdraw the proposed rule.

Sincerely,



ROBERT C. “BOBBY” SCOTT
Chairman

²⁴ *Id.* at 2024 n.3.

²⁵ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).